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C O N F I D E N T I A L SECTION 01 OF 02 SARAJEVO 000433

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DEPARTMENT FOR EUR(DICARLO), EUR/SCE(HOH/FOOKS), AND  
L(MANSFIELD/DOROSIN); NSC FOR BRAUN

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TAGS: [PGOV](#) [PREL](#) [PINR](#) [KJUS](#) [EUN](#) [UNSC](#) [BK](#)  
SUBJECT: BOSNIA: CONSTITUTIONAL COURT RULING CLAIMS OHR  
REMOVALS VIOLATED CIVIL RIGHTS

REF: A. 06 SARAJEVO 3209

1B. SARAJEVO 62

Classified By: DCM Judith B. Cefkin for reasons 1.4 (B), (D)

11. (C) Over Presidents' Day weekend, the Bosnian Constitutional Court released a July 2006 decision calling on the Bosnian government to address human rights violations stemming from OHR's 2004 removal from office of two Republika Srpska (RS) officials who had abetted war criminals. The Court ruled that the lack of an appeal process deprived Dragan Kalinic and Milorad Bilbija of rights guaranteed to them under the constitution. The Court did not challenge the High Rep's authority to remove the Kalinic and Bilbija, but it argued that Bosnia's international obligations do not supersede the government's requirement to protect the civil and human rights of Bosnian citizens pursuant to the Bosnian Constitution. This could involve seeking a revision of the High Rep's removal decisions or acting unilaterally to address the issue. Kalinic and Bilbija have threatened to file suit at the European Court of Human Rights (ECHR), if the Bosnian government does not implement the Constitutional Court ruling. The Court decision, much like the Council of Minister's December decision on decertified police officers (Reftels), directly challenges the High Rep's authority and Dayton. OHR is considering how to respond including whether to use of the Bonn Powers to annul the Constitutional Court decision. END SUMMARY

Kalinic and Bilbija Plan Strasbourg Suit  
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12. (U) Former Speaker of the RS National Assembly as well as former Serb Democrat Party (SDS) President Dragan Kalinic and former Deputy Head Operative of the Intelligence and Security Agency Milorad Bilbija were removed from office by former High Representative Paddy Ashdown on June 30, 2004 and December 16, 2004 respectively. Ashdown removed Kalinic because he failed to prevent the SDS from funneling money to ICTY indictees, including Radovan Karadzic. He removed Bilbija for his role in fostering in the RS "a culture of silence and deceit wherein war crime indictees were protected from justice." Both filed a series of domestic court cases disputing these dismissals and claimed their human rights has been violated, including their right to work, right to associate, and right to seek an appeal of the OHR decision. Lower courts gave various ruling on their inability to challenge OHR decisions and dismissed the cases. The Constitutional Court agreed to take up both cases in 2005 and because of the overlapping legal issues involved decided to

consider them as a single case.

#### July Constitutional Court Ruling

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¶13. (U) On July 8, 2006 the Constitutional Court concluded that the Kalinic's and Bilbija's "right to an effective legal remedy under Article 13 of the European Convention (for the Protection of Human Rights) has been violated due to lack of an effective legal remedy within the legal system of Bosnia Herzegovina, which could be pursued against the decisions of the High Representative concerning the rights of individuals and due to a fact that Bosnia and Herzegovina failed to undertake any activities within the scope of its positive obligation to secure an effective legal remedy against the said decisions of the High Representative." The ruling requires the Bosnian government to meet its constitutional responsibilities by securing a mechanism for Kalincic and Bilbija to appeal the High Rep's decision to remove them from office.

¶14. (U) The Court acknowledged that the High Rep has the "power to make binding decisions and authorities of Bosnia and Herzegovina have an obligation to co-operate with the High Representative, by virtue of both the General Framework Agreement for Peace and Security Council Resolution." However, the Court stressed that Article II(2) of the Bosnian Constitution applies the rights and freedoms of the European Convention for the Protection of Human Rights directly in Bosnia and that Article 13 of the European Convention of Human Rights requires "an effective remedy", should rights and freedoms be violated (i.e., legal recourse or an appeal process). The Court argued that the obligation of BiH in public international law to cooperate with the High Rep and to act in conformity with decisions of the UNSC cannot be

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considered to limit the constitutional rights of Bosnian citizens, which includes the right to "effective remedy" of violations.

#### Court Cites Venice Commission

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¶15. (U) The Constitutional Court cited a March 2005 opinion of the Venice Commission on the "Constitutional Situation in Bosnia and Powers of the High Representative" in support of its ruling. (Note: The Venice Commission issued this opinion in response to a request from the Council of Europe's Parliamentary Assembly, which asked whether OHR's ability to take enforceable decisions without legal remedy was in compliance with the European Convention. End Note.) The Venice Commission found that "as a matter of principle, it seems unacceptable that decisions directly affecting the rights of individuals taken by a political body (OHR) are not subject to a fair hearing or at least the minimum of due process and scrutiny by an independent court." The Court also drew a parallel between this case and the legal controversy surrounding UNIPTF decertification (Reftels), citing the Venice Commission opinion on this issue as well.

#### Court Creates Political Problem for Bosnian Government

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¶16. (C) Constitutional Court Registrar Faris Vehabovic admitted to us in confidence that the Court settled what it considered a relatively straightforward legal question, but in the process had created a huge political problem for the Bosnian government. (Comment: And, we would add, for the international community. End Comment.) It will be extremely difficult for the Bosnian government to protect Kalincic's and Bilbija's human rights as well as respect OHR's authority under Dayton, as the Court directs. Any Bosnian government action to enforce the decision would likely require the government to turn to the PIC or UNSC for help in providing "an effective remedy," Vehabovic said. (Note: Of course, the

Bosnian government could take unilateral action as it did with the issue of decertified police officers. End Note.) Vehabovic predicted the Bosnian government would not act to enforce the Court's decision, at least not immediately, which means Kalinic and Bilbija act on their threat to file suit against the Bosnian government at European Court of Human Rights. The ECHR would likely require 4-5 years to adjudicate the case, according to Vehabovic.

Comment

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17. (C) Like the Council of Minister's December actions on decertified police officers, the Constitutional Court ruling in the Kalinic and Bilbija case directly challenges Dayton and the High Rep's authority. The alleged human rights concerns in both instances are also similar: the right to appeal a decision taken to support the implementation of the Dayton Peace Agreement. The Court ruling opens the door to dozens of future legal challenges by persons the High Rep removed from office. Given his earlier position that the decertified police officers should have the right to appeal IPTF decisions, it will difficult for Schwarz-Schilling to argue that Kalinic and Bilbija should not enjoy the same right. OHR is now considering how to respond, but does not expect to take any action until after the February 26-27 PIC.

Among the options OHR is reviewing is whether to use the Bonn Powers to annul the decision, something we believe has not been done before. While some on Schwarz-Schilling's staff are arguing that this is the right course, we doubt he would do it given his philosophy about when and how to use the Bonn Powers. The Court's ruling will undoubtedly be raised on the margins of the PIC. We should encourage OHR to take the strongest appropriate action to prevent the Bosnian government from implementing the Constitutional Court ruling.

Late last year, the High Rep responded meekly to the CoM challenge. We cannot afford a repeat of this performance given the stakes involved. End Comment

MCELHANEY